(2)

No. 95-5

Supreme Court, U.S.
FILED
JUL 28 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GERALD MOSS, Ph.D., M.D.,

Petitioner,

—against—

MARK R. CHASSIN, M.D., as Commissioner of the State of New York Department of Health, STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT, and ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, THIRD DEPARTMENT

RESPONDENTS' BRIEF IN OPPOSITION

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 416-8566

VICTORIA A. GRAFFEO
Solicitor General

MARK G. PETERS*
Assistant Attorney General
of Counsel

*Counsel of Record

BEST AVAILABLE COPY

7pp

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
CONCLUSION	4

TABLE OF AUTHORITIES

Cases	PAGE
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	3, 4
Goldberg v. Kelly, 397 U.S. 254, (1970)	3
Mathews v. Eldridge, 424 U.S. 319 (1975)	3
United States v. Johnston, 268 U.S. 220, 227 (1925)	3
Withrow v. Larkin, 421 U.S. 35 (1975)	3, 4

INTRODUCTION

Petitioner seeks review of the Memorandum and Judgment of the New York State Supreme Court, Appellate Division, Third Department, dated November 23, 1994, (Petition, 3a-8a) which upheld the determination and order of the Administrative Review Board for Professional Medical Conduct ("ARB") of the New York State Department of Health ("DOH") revoking petitioner's medical license. Although petitioner challenges certain procedural aspects of the proceedings against him on the ground that his right to due process was violated, these claims simply involve the application of settled law to the facts of this case and therefore do not merit review by this Court.

STATEMENT OF THE CASE

Petitioner, Dr. Gerald Moss, is a surgeon who has been licensed to practice medicine in New York State since July 20, 1962. On August 7, 1992, the Office of Professional Medical Conduct ("OPMC") within DOH, which is responsible for investigating and prosecuting cases of professional misconduct, charged petitioner with practicing medicine with gross negligence, practicing medicine with negligence on more than one occasion, and failing to maintain adequate medical records. (Petition, 27a, 76a-81a).

A hearing was held before a committee of the State Board For Professional Medical Conduct (the "Hearing Committee") on ten occasions between August 28, 1992 and January 6, 1993. (Petition, 27a). OPMC presented the testimony of an expert witness and the testimony of the surviving patients as well as that of their families and the families of the deceased patients. (Petition, 24a-25a). Petitioner testified on his own behalf and presented the testimony of two fact witnesses and three expert witnesses. *Id.*

Based upon the testimony, the Hearing Committee found that petitioner had practiced with gross negligence on 3 occasions and determined that petitioner's license to practice medicine should be limited to consultation, to the exclusion of all other types of medical practice. (Petition, 27a-37a, 70a-72a, 75a).[1] Both petitioner and OPMC took an administrative appeal from this decision to the ARB. New York Public Health Law § 230-c. (Petition, 11a-12a).

After reviewing the entire record, the ARB sustained the Hearing Committee's determinations of the charges. (Petition, 12a-15a). However, the ARB overruled the Hearing Committee's penalty as inconsistent with the Committee's findings and conclusions, inappropriate, and insufficient to protect the public. *Id.* Instead, the ARB imposed the penalty of revocation of petitioner's license to practice medicine in New York State. *Id.*

Petitioner then commenced the instant lawsuit claiming, *inter alia*, that the proceedings before the Hearing Committee were tainted by procedural errors. In particular, petitioner claimed that: (1) the hearing was unduly delayed; (2) the chair of the hearing panel knew the OPMC's expert witness; (3) his statutorily required pre-hearing interview was improperly conducted. Petitioner also alleged that there was not sufficient evidence in the record to support the Hearing Committee's conclusions.[2]

---

[1] The Hearing Committee also found petitioner guilty of four specifications of failure to maintain adequate medical records and one specification of negligence on more than one occasion. (Petition, 70a-72a).

[2] Petitioner also commenced a federal lawsuit stemming from these events. The United States District Court for the Northern District of New York dismissed this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and the Court of Appeals for the Second Circuit affirmed. (Petition at 12). Petitioner has separately petitioned for certiorari in that action. *Id.*

By Memorandum and Judgment, dated November 23, 1994, the Appellate Division, Third Department, confirmed the ARB's determination and dismissed the petition. (Petition, 3a-8a). The Appellate Division found: (1) that petitioner had not been prejudiced by the delay in the proceedings; (2) that there was no evidence in the record that the chair of the hearing panel had actually been biased despite knowing OPMC's expert; (3) that any error in the pre-hearing interview had been corrected by the full hearing conducted *before* petitioner's license was revoked. (Petition, 5a-6a). The New York Court of Appeals denied leave to appeal (Petition, 1a-2a) and petitioner then filed the instant Petition.

REASONS FOR DENYING THE WRIT

Petitioner contends that this Court should review the three due process claims he raised below. However, the standards for due process at administrative hearings of the type held in this case are well established. *See, e.g., Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Mathews v. Eldridge*, 424 U.S. 319 (1975); *Withrow v. Larkin*, 421 U.S. 35 (1975); *Goldberg v. Kelly*, 397 U.S. 254, (1970). While the Petition alleges that these standards were not followed by respondents, the Petition does not raise any new or important question of federal law with regard to those standards. Nor does it suggest that there is any conflict between the decision below and the decision of "another state court of last resort or of a United States court of appeals." *See* Rule 10 of the Rules of the Supreme Court of the United States. Instead, petitioner simply seeks review of the lower court's analysis of the individual facts of his case. For this reason, the Petition should be denied. *United States v. Johnston*, 268 U.S. 220, 227 (1925)("We do not grant a certiorari to review evidence and discuss specific facts.").

In any event, petitioner received all the process that was due him in this case. Petitioner does not deny that *before* his

license to practice medicine was revoked, he was provided with notice of the charges against him. In addition, an evidentiary hearing was held at which he was represented by counsel, presented evidence in his own behalf and confronted the witnesses against him. Thereafter, the hearing was reviewed by the Supreme Court, Appellate Division and the New York Court of Appeals denied leave to appeal. Thus, all of the hallmarks of due process were provided to petitioner. *Loudermill*, 470 U.S. at 542; *Withrow*, 421 U.S. at 55. Moreover, as the Appellate Division correctly found, petitioner's various claims of procedural bias are unsupported by the record and therefore not sufficient to overcome the presumption of regularity which attaches to administrative decision makers. *Withrow*, 421 U.S. at 47.

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Dated: New York, New York
July 28, 1995

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 416-8566

VICTORIA A. GRAFFEO
Solicitor General

MARK G. PETERS*
Assistant Attorney General
of Counsel

*Counsel of Record